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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

Nos. 22, 23, 24.

JOHNSON OIL REFINING COMPANY, *Appellant,* vs. **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 22.**
JOHNSON OIL REFINING COMPANY, *Appellant,* vs. **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 23.**
JOHNSON OIL REFINING COMPANY, *Appellant,* vs. **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 24.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF FOR THE APPELLANT.

CHARLES Y. FREEMAN,
J. F. DAMMANN,
140 S. Dearborn St., Chicago, Ill.,
PRESTON C. WEST,
A. A. DAVIDSON,
Tulsa, Oklahoma,
J. A. McCULLUM,
Pawnee, Oklahoma,
Counsel for Appellant.

WILSON & McILVAINE,
140 S. Dearborn St., Chicago,
WEST & DAVIDSON,
Tulsa, Oklahoma,
McCULLUM & McCULLUM,
Pawnee, Oklahoma,
Of Counsel.

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It is contended by counsel for the appellee (see page 11) that the Supreme Court of Oklahoma has made a finding of fact that the actual situs of the cars in question was in Pawnee County, and from this assertion they

pass to the conclusion that there is no question of law involved to be reviewed by this court.

The judgment of the Supreme Court of Oklahoma was a conclusion of law upon the basic facts that are not in dispute. Such being the case, the doctrine often laid down by this court determines that contention against the appellees.

In *Old Dominion Steamship Company* v. *Virginia*, 198 U. S. 305, this court said, in speaking of a tax case appealed from the Supreme Court of Appeals of Virginia:

> "The facts being settled, the only question is one of law. Can Virginia legally subject these vessels to said taxation?"

Counsel cite no authority for their contention in this regard. We submit that the proposition laid down in the Old Dominion case above quoted is axiomatic and has been applied consistently both before and after that decision. Particularly we refer to the many tax cases which have come to this court where the same situation existed. Such cases we have cited in our brief in chief.

We wish also to direct this reply to the contention of counsel for appellee, which seems to be the crux of their position (see page 23 of their brief).

> "Tangible personal property is taxable:
>
> A. At domicile of owner, when no actual situs exists.
>
> B. At actual situs, when one exists.
>
> C. At wherever it may acquire a "fictitious situs," by virtue of reasonable legislative action.
>
> Obviously, the fiction represented by 'A' has no place when 'B' is present.
>
> * * * * * *
>
> But property may be taxable under 'A' or 'B' and at the same time several places, under 'C.'"

That is to say, the contention of counsel means that the entire fleet of cars for its entire value for the entire

period in question is taxable in Oklahoma because of the "actual situs" which they allege it has acquired in that State, and at the same time that it is taxable in any number of other States for the portion of that same tax period when the cars were in such States.

Nowhere do they define "actual situs" or refer to any authority giving the elements of a definition. They simply allege that these cars had an "actual situs" in Oklahoma even though it is admitted (page 3) that "they (the cars) are engaged in *principally* interstate commerce" (italics ours), and the statement of appellant is not denied that they are engaged in interstate commerce for 99 per cent of their use and were out of the State of Oklahoma for more than five-sixths of the time (24 Rec. 10, 11).

In their contention with reference to this so-called "actual situs" they point to the facts that the cars are always in transit (page 3), always routed to return to Oklahoma after they have been unloaded; that in Oklahoma there is a repair track for minor repairs (page 4); that their movements are largely directed from Oklahoma, and that when they come in to Oklahoma too fast for the demand they are stored on the tracks in Oklahoma.

From these facts they base a conclusion in the form of a question (page 18). "Are the cars temporarily in Pawnee County in transit a smaller part of the time, or do they have an actual situs in Pawnee County and are temporarily absent in transit a greater part of the time?" And they answer it in the affirmative (page 16) that the cars have in Oklahoma an actual situs, "regardless of temporary though *extended* absences from the State." (Italics ours.)

This narrow distinction puts the theory of taxation on a narrow unworkable base, and ignores the funda-

mental reason announced in all the cases, particularly the *Union Refrigerator Transit* case (199 U. S. 194), that taxation is a practical matter and relates directly to the protection that can be given to the property taxed by the State undertaking to tax it.

Counsel cite no authority for the proposition of law which they affirm, that the cars can be taxed in any number of different places. On the contrary this proposition is directly in conflict with principles laid down in the cases decided by this court. Of course it is true that there is nothing in the constitution against double taxation, but this court has said nevertheless that it will not adopt theories of taxation which will lead to highly undesirable and uneconomic results such as double taxation. This matter has received a very full consideration in several recent cases decided in this court.

In the case of *Safe Deposit & Trust Company* v. *Virginia*, 280 U. S. 90, involving personal property taxation on the corpus of a trust estate held in Maryland, the beneficiary living in Virginia, the court said with reference to the necessity of avoiding a theory which would lead to double taxation (pp. 92, 93):

> "Ordinarily this court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible personal property for taxation. *Blodgett* v. *Silberman*, 277 U. S. 1. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise." (p. 92.)
>
> * * * * * *
>
> "The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation, both unjust and oppressive." (p. 93.)

In the case of *Farmers Loan* v. *Minnesota*, 280 U. S. 204, involving an inheritance tax by Minnesota on the estate of a New York citizen with reference to bonds issued by various municipalities of Minnesota, this court said (p. 210):

> "Nor is it permissible broadly to say that notwithstanding the Fourteenth Amendment two States have power to tax the same personalty on different and inconsistent principles or that a State always may tax according to the fiction that in successions after death *mobilia sequuntur personam* and domicile govern the whole. *Union Refrig. Transit Co.* v. *Kentucky, supra; Rhode Island Trust Co.* v. *Doughton, supra,* and *Safe Deposit & Trust Co.* v. *Virginia, supra,* stand in opposition."
>
> "*Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, indicates plainly enough that the right of one State to tax may depend somewhat upon the power of another so to do. And *Coe* v. *Errol*, 116 U. S. 517, 524, though frequently cited to support the general affirmation that nothing in the Fourteenth Amendment prohibits double taxation, does not go so far. It affirmed the rather obvious proposition that the mere fact of taxation of tangibles by one State is not enough to exclude the right of another to tax them." (p. 211.)

Finally, in the case of *First National Bank* v. *Maine*, 284 U. S. 312, which involved the question of an inheritance tax on the estate of a resident of Massachusetts with reference to stock he owned in a Maine corporation, this court held that it could not be taxed in Maine, and said with reference to double taxation, as follows (p. 322):

> "The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living

of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only." (pp. 326-327.)

* * * * * *

"We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only." (p. 328.)

We submit that personal property can no more have a double situs for the purpose of personal property taxation than it can for purpose of inheritance taxation. The above cases should preclude an application of any theory which gives to the property a situs in two different States at the same identical time for taxation in both places. On the other hand, the theory expressed in the cases cited in our brief in chief at page 23 provide for taxation by each State on a proportionate basis for the period that the cars may be within the State, and subject to its protection.

The above cases clearly demonstrate that intangibles can only be taxed at one place, so what possible basis of distinction is there for holding that movable tangibles are not to be treated in the same way, and that they can be taxed in two States. On the contrary, as we have shown from the *Union Refrigerator Transit* case (199 U. S. 194), this court refused to permit movable tangibles, such as cars, to be taxed both in the domicile of the owner and in the various States where the cars were located from time to time. The same principle was held by the Supreme Court of Illinois in a case very similar to the case at bar. *Keith Ry. Eq. Co.* v. *Board of Review,* 283 Ill. 244, 119 N. E. 302. If double taxation is not permitted with reference to the domicile and the States where the cars may happen to be, what ground is there for holding as counsel has urged that double taxation is permitted in the case of "actual situs," as they use the term, and in the States into which they may move.

Respectfully submitted,

CHARLES Y. FREEMAN,
J. F. DAMMANN,
PRESTON C. WEST,
A. A. DAVIDSON,
J. A. MCCULLUM,
Counsel for Appellant.

WILSON & MCILVAINE,
WEST & DAVIDSON,
MCCULLUM & MCCULLUM,
Of Counsel.